

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Marriage of)	NO. 61947-1
)	
MARY READ DEETS,)	DIVISION ONE
)	
Respondent,)	
)	UNPUBLISHED OPINION
and)	
)	
ALLYN CHARLES DEETS,)	
)	
Appellant.)	FILED: June 22, 2009
)	

Leach, J. — Allyn Deets appeals from the final dissolution decree entered in this case, arguing that the trial court improperly considered his failure to purchase real property from his mother in determining the final distribution. We agree and remand for a new distribution that does not take into account Allyn's failure to purchase the property.

Background

Allyn and Mary Deets were married on January 1, 1963. During their marriage, they acquired significant assets, including interests in real property given to them by Allyn's parents and a drugstore business they purchased from Allyn's parents in 1975. Allyn and Mary separated in early May 2005. Mary filed a petition for dissolution in January 2006. The parties entered several stipulations regarding property distribution,

and the remaining issues were decided by the court following a five-day trial in late 2007. The final distribution resulted in a transfer payment of \$232,271 to be paid by Allyn to Mary.

In arriving at the final distribution, the trial court considered an “option to purchase” real property from Allyn’s mother, which it held was a valuable community asset wasted by Allyn. The property was a commercial building that the couple leased from Allyn’s parents to house their drugstore business, Fountain Galleria. The most recent lease was dated December 30, 1991, and was for a term of 15 years. It contained the following provision:

In the event of the death of Howard C. Deets, the Lessees agree to purchase the property from his wife, Dorothy A. Deets, at a fair price. The purchase transaction shall be made in the form of a 15-year contract with a fair interest rate. This lease will remain in effect until the purchase arrangements are complete and the contract is in effect, at which time this lease will no longer be in effect. The details of this purchase agreement shall be specified in a separate document.

Howard Deets died in 2003, before the expiration of the lease. Upon his death, Mary and Allyn each inherited a 14 percent interest in this property, with the remaining 72 percent owned by Allyn’s mother, Dorothy Deets. Neither Allyn nor Mary nor Dorothy attempted to enforce the contract to purchase between Howard’s death and the commencement of this action in 2006. In January 2007, Mary, through her attorney, reviewed the lease to formulate a plan for selling the drugstore business. Following this review, she demanded that Allyn cooperate in purchasing Dorothy’s interest in the property. In response to an inquiry from Mary’s counsel, Dorothy

indicated that she was willing to sell her interest for \$619,920, or 72 percent of the property's value on the date Howard died. Mary proposed she and Allyn sign a joint promissory note for a 30-year purchase agreement with 5 percent interest.

Allyn did not agree to purchase the property because he did not want to enter an agreement to own property jointly with his estranged wife. He also questioned the validity of the contract to purchase, but the trial court refused to consider Allyn's challenges to the contract. The court held that Allyn was "not the proper party" to question its validity because his mother, Dorothy Deets, "was willing to allow the parties the benefit of the transaction." The trial court held that Allyn could not contest the validity of the contract to purchase and that he breached a fiduciary duty to the marital community by failing to purchase the property.

Allyn challenges the court's consideration of the "option to purchase" as an asset and its determination that he had a fiduciary duty to purchase the property. He also challenges the trial court's finding that he was intransigent due to his failure to purchase the property and the trial court's resulting award of \$5,000 in pretrial attorney fees to Mary for work related to the "option to purchase."

The final distribution also included a transfer payment of \$50,000 to Mary. The trial court ruled,

[Based on] a number of factors and perhaps one of the key factors is the financial situation that both parties will be left in at the conclusion of this dissolution and the differences in the Social Security available, each party will be left with substantial assets, but I believe in addition to the amounts set forth Mrs. Deets should receive the additional sum of \$50,000.

Although the court states that its ruling is based on “a number of factors,” it only identifies one of those factors. Allyn argues that the \$50,000 transfer was an impermissible penalty for marital misconduct.

Finally, Allyn argues that the trial court erred when it required Allyn to reimburse Mary for \$15,000 in unearned excess salary. While the dissolution was pending, a commissioner ordered that Mary alone manage the drugstore business and that each party receive income from the store in the amount of \$4,000 per month, notwithstanding the fact that Allyn would not be working there. However, the trial court determined that the \$30,000 the drugstore had paid Allyn was unearned and amounted to unjust enrichment. Instead of having Allyn pay \$30,000 back to the drugstore, which was being liquidated and distributed to the parties equally, the court ordered that Allyn reimburse \$15,000 directly to Mary.

Standard of Review

The distribution of property in a dissolution should be disturbed only if there has been manifest abuse of discretion because the trial court is in the best position to determine what is fair and equitable under all the circumstances.¹

Discussion

A. Contract to Purchase

Allyn argues that the trial court erred by improperly considering the contract to purchase the drugstore property as a community asset when determining a fair and

¹ In re Marriage of Brewer, 137 Wn.2d 756, 769, 976 P.2d 102 (1999) (citing In re Marriage of Konzen, 103 Wn.2d 470, 477-78, 693 P.2d 97 (1985)).

equitable distribution and in finding that he breached a fiduciary duty to the community by failing to allow the marital community the benefit of that transaction.

The parties dispute whether the lease's purchase provision is an option to purchase or an enforceable obligation to purchase. We hold that it was neither. The provision provides, "In the event of the death of Howard C. Deets, the Lessees agree to purchase the property from his wife, Dorothy A. Deets, at a fair price. The purchase transaction shall be made in the form of a 15-year contract with a fair interest rate." Because the provision did not specify an essential term—the price—it was not an enforceable contract for the sale of real property.² Thus, at the time Mary alleges she and Allyn were obligated to purchase the property (immediately following Howard's death), the alleged contract to purchase was of no value to the community because neither the marital community nor Dorothy could have enforced it.

Mary admitted that she never asked Allyn to purchase the property or even discussed it with him until she was preparing to sell the business in January 2007. At that time, Dorothy indicated she was willing to sell the property at a price equal to its value on the date Howard died, and an opportunity to purchase the property arose. However, Mary testified that she did not want to purchase the property and own it with Allyn. Also, she did not ask the trial court to award to her any right the marital community might have to purchase the property. Instead she asked the court to

² RCW 64.04.010; Friedl v. Benson, 25 Wn. App. 381, 389, 609 P.2d 449 (1980) (holding that alleged option contract referring to purchase price as "price to be determined" did not contain all essential and material parts of an option to purchase real estate sufficient to remove it from the statute of frauds).

consider the property as an asset the marital community did not own as a consequence of misconduct by Allyn, with the lost equity treated as an asset awarded to Allyn.

As discussed above, the marital community had no enforceable right to purchase the property before this proceeding was commenced by Mary. Mary has cited no authority for the proposition that a spouse has a fiduciary duty to purchase commercial real property for the benefit of the community during the pendency of a contested dissolution proceeding, even for a favorable price. Washington law requires a spouse to act in good faith when managing community property and to unilaterally expend community funds only in the interest of the community.³ However, once a marriage is defunct, a spouse has no obligation to act for the common good of the marital community with respect to new business opportunities.⁴ Therefore, Allyn had no fiduciary obligation to join with Mary in accepting Dorothy's 2007 offer to sell the property made 18 months after the parties separated and approximately one year after Mary commenced this contested marriage dissolution proceeding.

Mary argues that the trial court did not treat the contract as an asset, but rather that it considered Allyn's failure to purchase the property a breach of fiduciary duty to the marital community because it was an act of waste and in bad faith. However, as we have shown, there was nothing to be wasted here and no fiduciary duty to purchase the property. Thus, whether the trial court treated the alleged contract to purchase strictly as an "asset" is immaterial because it was improper to consider it at all.

³ In re Marriage of Chumbley, 150 Wn.2d 1, 9, 74 P.3d 129 (2003).

⁴ Peters v. Skalman, 27 Wn. App. 247, 253, 617 P.2d 448 (1980).

In its oral ruling and its formal findings of fact, the trial court held that it was “a valuable community asset.” The trial court adopted the proposed allocation of that “asset” in petitioner’s trial exhibit 45, a spreadsheet that placed the value of the “option,” \$355,680, on Allyn’s side of the ledger. The trial court erroneously held that Allyn owed “a fiduciary duty to the community which he has deliberately breached in this instance.” In addition, the court held that the value of Allyn’s “marital waste/misconduct” was “a factor in the Court’s final distribution” and awarded reasonable attorney fees of \$5,000 to Mary for that misconduct. Because the only basis for the fee award was misconduct related to Allyn’s failure to purchase the drugstore property, it was error.

Because Allyn did not have a fiduciary duty to purchase the drugstore property from his mother, the trial court’s distribution of assets and award of \$5,000 in attorney fees were an abuse of discretion. Therefore, we reverse and remand for a new distribution of assets and liabilities that does not take into account, in any fashion, Allyn’s failure to purchase the property.

B. \$50,000 Transfer Payment

Allyn argues that the trial court’s ruling that Mary should receive an additional \$50,000 was an impermissible penalty against Allyn for marital misconduct. However, the record does not support this argument.

The trial court ruled based on “a number of factors” that Mary should get an additional \$50,000 but stated that “perhaps one of the key factors is the financial

situation that both parties will be left in at the conclusion of this dissolution and the differences in the Social Security available.” The trial court may consider the possibility that the parties may receive social security, as long as the court does not calculate a formal valuation of future social security to award as a precise property asset.⁵ The trial court here did not improperly consider the precise value of future social security but only noted that Allyn was likely to receive significantly higher benefits.

The trial court did not state that marital misconduct was one of the reasons for the additional transfer to Mary. In fact, the trial court stated that although it had observed Allyn’s behavior and believed the record was “replete with examples of” Allyn’s intransigence,

[T]here was nothing in any part of my decision or allocation of property here that is intended to be punitive to Mr. Deets for any of that, for any of my observations or conclusions. It will reflect, be reflected a little bit later in terms of, well let me just, I'll get back to that.

In terms of the request for attorneys fees, that’s how it will be reflected a little bit. But not in the property division.

There is nothing in the record to suggest that the \$50,000 transfer payment was a penalty for misconduct.

C. \$15,000 Salary Reimbursement

Allyn argues that the trial court erred in requiring him to reimburse Mary for funds he was paid by Fountain Drug while the dissolution was pending under a temporary order issued by a court commissioner. Allyn argues that this was error

⁵ See In re Marriage of Rockwell, 141 Wn. App. 235, 244-45, 170 P.3d 572 (2007); In re Marriage of Zahm, 138 Wn.2d 213, 222-23, 978 P.2d 498 (1999).

because the trial court may not retroactively modify an order. We disagree.

By temporary court order, Fountain Drug paid Allyn \$30,000 from May 2006 until December 2006. During the same period of time, Mary was paid the same salary by Fountain Drug, while being solely responsible for running the business. The May 2006 order stated, “Notwithstanding the husband Allyn Deets is not working in the business, the court deems both parties should continue to receive equal incomes of \$4,000/mo.” The order provided that the court on a party’s motion would review Allyn’s salary in December 2006, but Mary did not move to modify or terminate the salary until September 2007, shortly before trial. After trial, the court determined that the payments were unearned and amounted to unjust enrichment and thus ordered that Allyn reimburse \$15,000 to Mary, which was equal to 50 percent of the earnings paid to him by Fountain Drug.

Allyn cites In re Marriage of Shoemaker⁶ for the proposition that the trial court cannot retroactively modify an order. However, Shoemaker held that the trial court could not vacate a final child support order. That case does not apply because the order in this case was neither final nor about child support.

The parties do not dispute that the commissioner’s order was issued under RCW 26.09.060, which authorizes temporary orders in dissolution proceedings. RCW 26.09.060(10) provides that a temporary order “[d]oes not prejudice the rights of a party . . . to be adjudicated at subsequent hearings in the proceeding” and may be

⁶ 128 Wn.2d 116, 121, 904 P.2d 1150 (1995).

“revoked or modified.” It was within the trial court’s discretion to take into account the unearned income paid to Allyn in reaching a final and equitable distribution.

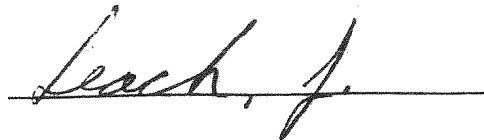
D. Attorney Fees

Mary requests attorney fees under RAP 18.9, arguing that this appeal is frivolous. Because this appeal is not frivolous, we do not award attorney fees.

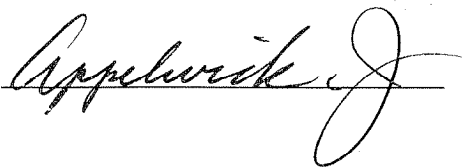
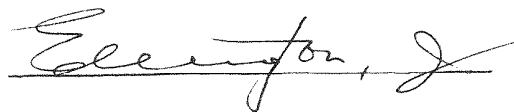
E. Motion to Supplement the Record

Allyn moved to supplement the record in this case with testamentary documents relating to his mother Dorothy’s estate. Because these documents are irrelevant to our disposition, the motion is denied.

Reversed and remanded.

A handwritten signature in cursive script, reading "Leach, J.", written over a horizontal line.

WE CONCUR:

A handwritten signature in cursive script, reading "Appelwick, J.", written over a horizontal line.A handwritten signature in cursive script, reading "Eberington, J.", written over a horizontal line.